FILE COPY

No. 35, Original

Office-Supreme Court, U.S.
FILED
FEB 11 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, *et al.*,

Defendants.

MOTION BY NEW JERSEY FOR REFERENCE OF CASE TO A MASTER

STATE OF NEW JERSEY,
GEORGE F. KUGLER, JR.,
Attorney General.

ELIAS ABELSON,
Assistant Attorney General,
State of New Jersey,
State House Annex,
Trenton, New Jersey, 08625.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

PAGE

THIS CASE AND ITS CENTRAL HISTORICAL ISSUES SHOULD BE REFERRED TO A MASTER FOR INITIAL DETERMINATIONS 1

CONCLUSION 4

Cases Cited

Martin v. Waddell, 16 Pet. 367 (1842) 2, 3

Texas v. New Mexico, 344 U. S. 906 (1952) 4

Text Cited

Holmes, The Common Law 1 (Little Brown & Co. 1944) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

MOTION BY NEW JERSEY FOR REFERENCE OF CASE TO A MASTER

This office is in receipt of a motion for judgment by the United States, with supporting brief, and a motion by eight of the defendant States for reference to a Master, also with supporting brief.

New Jersey joins in the motion of the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia and urges this Court to refer the case to a Master. New Jersey adopts the brief of the above named defendant States with the following additions and modifications.

This Case and its Central Historical Issues Should be Referred to a Master for Initial Determinations

In its motion for judgment, the United States seeks to focus the attention of the Court upon prior decisions

which it is alleged forecloses the States from now raising the issue of the State's proprietary rights to develop the seabed and subsurface lands beyond the three-mile limit. In considering the arguments of the United States, and the cases raised in support of those arguments, New Jersey perceives an unpliant view of the historical development of this issue. In relying upon the accretions of a series of judgments, and weighing these in terms of the relationship and distribution of power between the national government and the States, the United States asks this Court to confront the single question of whether the determined nationalism of the past shall be invoked to protect the economic evolution of the future. Should the reasons and purposes of other courts in other times be permitted to override the legitimate historic claims of the States to the rights which they have always possessed as concomitants of their original, separate sovereignty? By seeking the appointment of a Master, the States in concert ask this Court to review the claimed proprietary rights and to pass upon their present locus.

Mr. Justice Holmes has pointed to the development of judicially enhanced legal institutions as a response to

> ". . . [T]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men. . . ." Holmes, *The Common Law* 1 (Little Brown & Co. 1944).

Thus, for example, in examining early cases such as *Martin* v. *Waddell*, 16 Pet. 367 (1842), and its conclusion that as to lands under inland navigable waters the States exercised dominium, should not the ascribed attributes and privileges of sovereignty be read and interpreted in the light of the political purpose of the Court passing upon the issue.

Chief Justice Taney, speaking for the Court in *Martin* v. *Waddell, id.* notes that at the time of the Revolution

> ". . . when the people of New Jersey took possession of the reigns of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the State." *Martin* v. *Waddell* at 416.

If the Court had not bottomed its actions on the above stated premise, it is conjectural whether in fact it would have returned to Queen Anne the dominium which had passed to the Proprietors as a privilege of sovereignty. And, if the lands had not been judicially declared encompassed by the act of surrender, they would remain vested in the Proprietors of New Jersey to this day. This vesting applies equally to such rights offshore as may have passed by royal grant.

New Jersey will not dwell on these questions at this time. The point is raised merely by way of illustration of the significance of the historical inquiry the States seek by the motion for reference. The dynamics of economic interplay read against a background of today's political mileau require a careful examination of the charter origins of states' rights beyond the three miles reserved by statute.

The compilation of historical data perforce is a time-consuming enterprise. New Jersey has enlisted the aid of the Department of History at Rutgers, the State University, for this effort. The academic year at Rutgers concludes on May 28, 1970. Until that date the time demands upon University personnel participating in research aspects of this case are constraining. For this

reason, if this Court determines to follow the course suggested by the United States, New Jersey would prefer that its answering brief be filed no earlier than Friday, July 31, 1970. This would permit the inclusion of that material otherwise prepared for submission to a Master. A shorter time schedule would be burdensome and prejudicial to New Jersey's position.

CONCLUSION

For the foregoing reasons, New Jersey submits that the case be referred to a Special Master and that the Master be directed in particular to consider and prepare detailed findings upon the historical claims of each of the thirteen defendant States. See, *e.g.*, *Texas* v. *New Mexico*, 344 U. S. 906 (1952). In making this request, New Jersey reserves the right and declares its intention to provide the historical material to the Court directly in the most efficient manner possible if the motion is denied and briefing and argument on the motion of the United States for judgment are ordered.

Should the Court follow the course suggested by the United States, New Jersey requests this Court to fix a schedule for briefing and oral argument by which the answering brief of the State of New Jersey will be due no earlier than July 31, 1970. In all other respects, New Jersey concurs with the conclusions of the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia.

Respectfully submitted,

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey.

ELIAS ABELSON,
Assistant Attorney General,
State House Annex,
Trenton, New Jersey 08625